A **SOON CHOON SIM**

v.

SOON CHENG SAI & ORS

B HIGH COURT MALAYA, PULAU PINANG
CHEW SOO HO JC
[CIVIL SUIT NO: 22-47-2004]
25 JANUARY 2011

C ***CIVIL PROCEDURE:*** *Costs - Application for - Defendants seeking costs to be jointly and severally paid by the plaintiff and a third party - Whether the court ought to award costs against the third party - Factors to consider - Whether suitable to award in the present case*

D ***CIVIL PROCEDURE:*** *Action - Limitation - Defendants raising defence of time bar against the plaintiff - Plaintiff bringing action 15 to 16 years after cause of action accrued - Whether the plaintiff time barred from bringing this action - Limitation Act 1953, s. 23*

SUCCESSION: *Probate - Contents of the Will - Whether there had* E *been suspicious circumstances surrounding the making of the Will by the deceased - Whether the plaintiff had successfully proven conspiracy to defraud the deceased on the part of the defendants*

SUCCESSION: *Probate - Testamentary capacity - Whether the* F *deceased had been aware of the contents of his Will when executing it - Whether the contents of the Will had reflected his intentions - Evidence adduced*

SUCCESSION: *Will - Residuary estate - Whether the jewellery claimed* G *by the plaintiff part of the deceased's residuary estate - Whether the plaintiff entitled to the residuary estate of the deceased - Contents of the Will*

The plaintiff and the 1st and 2nd defendants are siblings and the children of Soon Eng Hooi ('deceased'), who died leaving a Will H dated 2 November 1982 ('Will') wherein the 1st and 2nd defendants are the executors and trustees of the Will. The 3rd defendant is the solicitor who prepared the Will. The Will was probated and pursuant to the Grant of Probate, the 1st and 2nd defendants disbursed a sum of RM20,000 to the plaintiff, which I the latter duly accepted. Fifteen years later the plaintiff filed this action against the defendants claiming *inter alia* a declaration that the deceased had died intestate and that the Will had been

invalid, an order that the Grant of Probate be set aside, an order for the restoration of all assets of the deceased or alternatively damages to the plaintiff *in lieu* of restoration and damages for fraud in the procurement of the Said Will. The defendants defended the matter on the grounds that this action had been statute barred by virtue of the Limitation Act 1953 and that the plaintiff had been estopped from instituting and maintaining this action on the grounds of multiplicity of action. There were four main issues that arose for determination before this court: (i) whether the deceased had had the testamentary capacity to make and execute the Will, (ii) whether there had been any suspicious circumstances to the making of the Will and/or any conspiracy to defraud the deceased and/or the plaintiff by the defendants, (iii) whether the defendants had fraudulently concealed and/or neglected to disclose the entirety of the properties comprised in the estate of the deceased in the Petition for the Grant of Probate and (iv) whether the plaintiff's claim had been time barred under the Limitation Act 1953.

Held (dismissing plaintiff's action with costs):

(1) There was no dispute that the Will had been signed by the deceased himself and that it had been executed in the presence of DW3. The unchallenged evidence of DW3 that the deceased had executed the Will after the contents had been explained to him and that he had indicated understanding to those contents, had indicated an affirmative proof of fact that at the time of the execution of the Will, the deceased had understood the effect of his wishes being carried out upon his death, the extent of the property to which he would be disposing off and parties to whom his property would be left to. The omission by the 3rd defendant to produce documents to show that there had not been any impairment of the deceased's mind on his testamentary capacity, had not affected the fact that the deceased had had the testamentary capacity to execute the Will. Thus, upon a finding of fact, the plaintiff had failed to prove that the deceased had lacked the testamentary capacity to make and execute his Will. (paras 13 & 14)

(2) The concern of the court had not been to consider the fairness of the Will, once it had been satisfied that the testator had understood the dispositions of the Will and duly executed it. (para 14)

(3) There were no suspicious circumstances surrounding the making of the Will by the deceased. The alleged amendments by DW1 on the draft Will had received the approval of the deceased as he had understood the contents of the final Will which had incorporated the said amendments, and signed it accordingly. His signature had been his assent in the absence of fraud or any other vitiating factors. (para 16)

(4) On the question of fraud, it had been incumbent on the plaintiff to prove it on a standard of proof beyond reasonable doubt. There had not been an iota of evidence before the court to prove the allegation of conspiracy to defraud the deceased and/or the plaintiff, in particular, by the defendants. (paras 17 & 18)

(5) The Will had not mentioned anything about jewellery and no disposition had been made regarding the same. Thus assuming that the jewellery had existed and had belonged to the deceased upon his wife's death for which no bequeath had been made, it would fall into the residue of the deceased's estate. The plaintiff had not been entitled to any of the residuary estate pursuant to cl. 5 of the Will. On this ground, her claim had to fail. (paras 19 & 20)

(6) The plaintiff had taken between 15 to 16 years from the time of Grant of Probate to file this suit. Section 23 of the Limitation Act 1953 clearly bars any action after the expiration of 12 years from the date the right to receive the share or interest accrues. Thus, her claim to the personal estate of the deceased was barred and on this ground alone, her claim ought to be dismissed. (paras 21 & 22)

(7) On the issue of costs being jointly and/or severally paid by PW1 as he had been instrumental in instituting this action for the plaintiff and due to his 'closeness' to the plaintiff, PW1 had not been warned of the possibility of costs being applied against him at the earliest opportunity in consonance with the 3rd guideline in the *Symphony* case as in *Takako Sakao (No. 3)*. Thus it would be unjust to order costs against him. The plaintiff herself had been emphatic that she had brought this action on her own accord and that nobody had influenced her. (paras 23, 24 & 26)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***
Banks v. Goodfellows [1870] 5 QB 549 ***(refd)***
Browne v. Dunn [1890] 6 R 67 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Longford v. Purdon [1877] 1 LR Ir 75 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***
PP v. Abdul Rahim Abdul Satar [1990] 1 CLJ 840; [1990] 3 CLJ (Rep) 1 HC ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Takako Sakao v. Ng Pek Yuan & Anor (No 3) [2010] 1 CLJ 429 FC ***(refd)***
Tho Yow Pew & Anor v. Chua Kooi Hean [2002] 4 CLJ 90 CA ***(refd)***
Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 73(1)(a), 163
Limitation Act 1953, ss. 22(1), 23

Other source(s) referred to:

John G Ross Martyn, Stuart Bridge and Mika Oldham, *Theobald on Wills*, 16th edn, pp 30, paras 3-02, 3-18

For the plaintiff - Surinder Singh (SY Ho with him); M/s Ong & Manecksha
For the 1st defendant - Ramsun Ho; M/s See Ramsun & Tan
For the 2nd defendant - Tan Beng Hong; M/s Gan Teik Chee & Ho
For the 3rd defendant - KB Tan; M/s KB Tan & Kumar

Reported by Sharmini Pillai

JUDGMENT

Chew Soo Ho JC:

[1] Plaintiff and the 1st and 2nd defendants are siblings and children of Mr. Soon Eng Hooi, deceased, who died on 31 December 1986 leaving a Will dated 2 November 1982 ('the Will') for which the 1st defendant and 2nd defendants are the appointed executors and trustees. The 3rd defendant is the solicitor who prepared the Will and attested it as one of the witnesses to the signature of the deceased on the Will on 2 November 1982. The Will was probated on 1 September 1987 with the Grant of Probate duly issued on 4 October 1988.

Following the Grant of Probate, the 1st and 2nd defendants as executors of the estate disbursed the sum of RM20,000 to the plaintiff in accordance with the bequeath in the Will. The plaintiff had accepted and acknowledged receipt of the said sum on 13 January 1989. On 28 January 2004 which is 15 years later, plaintiff filed this suit against the defendants in her personal capacity as a beneficiary of the estate of the deceased claiming *inter alia* a declaration that the Will dated 2 November 1982 is invalid and that the deceased died intestate, an order that the Grant of Probate under Penang High Court Petition No. 45-41-1987 be set aside, an order for the restoration of all assets of the deceased or alternatively damages to the plaintiff *in lieu* of restoration, damages for fraud in procurement of the said Will. The grounds as pleaded are *inter alia* that the deceased lacked mental capacity to make and execute a Will on account of ill health, memory loss etc; the 1st and 3rd defendants had by wrongful means conspired and combined to defraud the deceased and the plaintiff depriving the plaintiff of her rightful share in the deceased's estate; the 3rd defendant had negligently prepared, drafted and/or caused to be executed the Will without exercising care and skill expected of a reasonably competent solicitor; thus it was contended that the Will is null and void and of no effect and the deceased consequently died intestate. In addition, plaintiff also pleaded that all the three defendants in the petition for Grant of Probate had fraudulently concealed and/or neglected to disclose the entirety of the properties comprised in the estate of the deceased, in particular, the residue of the estate. It was also pleaded that the defendant's fraudulent conduct and the 3rd defendant's negligent conduct were made known to the plaintiff by one Soon Cheng Par who discovered the same *vide* Penang High Court Civil Suit No. 22-133-1997 in which he sued the 1st and 2nd defendants relating to the Will and the Grant of Probate basing on the Will.

[2] 1st defendant's defence is that the plaintiff's cause of action is statute barred by the Limitation Act 1953, that the plaintiff is estopped from instituting and maintaining this action which is similar to Soon Cheng Par's Civil Suit No. 22-133-1997 on ground of multiplicity of action. It was alleged that the Will is the Last Will and Testament of the deceased which was prepared, drafted by the 3rd defendant, a solicitor from Messrs. Lim, Lim & Oon and executed by the deceased in the 3rd defendant's presence. The deceased was at all material time of sound mind and had the mental capacity to make and execute the Will. From 1982 until 1986, the deceased as Chairman of the Board of

Directors of Soon Eng Hooi & Sons Sdn. Bhd. had attended and chaired all shareholders' meetings prior to his death on 31 December 1986. The deceased was literate and able to understand English and understood the content of the said Will when he executed it. The 1st defendant denied all allegations of conspiracy to defraud and other matters alleged by the plaintiff. On the Grant of Probate in respect of the Will, the 1st defendant averred that it was duly granted and issued by the Penang High Court. The 2nd defendant's defence is substantially similar to 1st defendant that the Will was validly made by the deceased and he had no knowledge whether deceased had left behind any jewellery or personal belongings as alleged by the plaintiff as the 2nd defendant had been residing in Singapore since 1958. He denied all allegations of wrong doings by the plaintiff. The 3rd defendant's defence also raised similar issues as the 1st defendant. In addition, he pleaded that the Will was drafted in accordance with the wishes and instructions of the deceased and it was voluntarily executed by the deceased on 2 November 1982 with deceased's full knowledge of its contents and effect. He also denied all wrong doings as alleged by the plaintiff.

The Issues

[3] From the facts and evidence of this case, the following issues arose for the determination in this suit:

1. Whether the deceased had the testamentary capacity to make and execute the Will dated 2 November 1982;
2. Whether there were any suspicion circumstances to the making of the Will and/or any conspiracy to defraud the deceased and/or the plaintiff by the defendants;
3. Whether the defendants had fraudulently concealed and/or neglected to disclose the entirety of the properties comprised in the estate of the deceased in the Petition for Grant of Probate; and
4. Whether the plaintiff's claim is barred by the Limitation Act 1953 (Act 254).

Evaluation & Findings

Plaintiff's Case

[4] Plaintiff (PW2) is 88 years of age. She testified in English. In spite of her age, I find that she is alert, able to understand the questions put and able to answer cogently although there

appeared to be a slight hearing deficiency. Her evidence shows that she felt she was cheated as regard the Will as it was unfair for her to receive only RM20,000 from the estate of her father, the deceased abovenamed who was very sick in his late years. She described her relationship with her father to be a happy one and her marriage was one where her husband was married into her family instead of the bride being moved over to the bridegroom's house or place of stay as in the normal case. For all the years, her father looked after the household and expenses. About four years after her marriage which was sometime in 1945, she moved out of the family house at Aboo Siti Lane, Penang to Kuala Lumpur as her husband was transferred to Kuala Lumpur but had visited her father on and off. When she subsequently returned to live in Penang, her father bought a house in the name of his brother but for her and her husband to live in. As to the jewellery, plaintiff said that the jewellery belonged to her mother in five bags which were intended to be distributed among the five children, she had seen some of them. When she was referred the list of missing assets as claimed by her *vide* pp. 26-28 of bundle B, she replied that she knew some of the jewellery but not all the items listed. Plaintiff knew about the Will after it was probated. She knew of the earlier suit filed by Soon Cheng Par but was unaware of the consent order in which two properties were given by the 1st defendant to Soon Cheng Par; she however knew that the house No. 5 Aboo Siti Lane, Penang was given to Soon Cheng Par. She was not happy that her father only gave her RM20,000 as her father had a lot of money. She also alleged that she heard her father had changed his Will and that her father had never seen the lawyer. However, plaintiff also stated that her father was a strict man who would decide what was best for his family and that no one could advise him or go against what he wanted to do.

[5] PW1, Soon Ewe Seang, is the plaintiff's nephew *cum* attorney (*vide* the Power of Attorney dated 31 May 2003 at pp. 9-13 bundle B) who assisted plaintiff to recover her entitlement. He is also the son and attorney of Soon Cheng Par in the earlier suit against the 1st and 2nd defendants. He alleged that deceased was not involved in the drafting of the Will but agreed in cross-examination that he did not know as a fact whether deceased was involved in the discussion leading to the draft Will. He was also not around when the Will was executed and had no knowledge of the deceased's testamentary capacity at the time of the execution of the Will. He alleged that 1st and 2nd defendants had

cheated the plaintiff by referring to correspondence between 3rd defendant and the 1st and 2nd defendants over the Will to the exclusion of the deceased. He also referred to the property known as 7 Brown Road which is not involved in the Will to allege collusion of 3rd defendant and a meeting in November 1991 with the presence of the plaintiff in which the 2nd defendant admitted that there were five bags of jewellery set aside for each of the five surviving children. On the consent order in respect of his father's suit, PW1 said he had informed the plaintiff in 2002 and plaintiff's husband was also present in court for the earlier suit No. 22-133-1997. As to the 3rd defendant, PW1 testified *vide* his witness statement (P1) that 3rd defendant was an advocate and solicitor of the High Court of Malaya and was the solicitor who had conduct directly or indirectly in the preparation, drafting and execution of the Will and was acting for 1st and 2nd defendants in the petition for the Grant of Probate *vide* Petition No. 45-41-87 in the Penang High Court.

Defendants' Case

[6] 1st defendant (DW1) is 89 years old. He too testified in English. I also find him to be alert, able to comprehend the questions asked and to give cogent answers *albeit* slowly because of hearing problem. He is the eldest son in the family. He and his eldest son Soon Ewe Keng had been helping the deceased in the family business. He confirmed that the deceased was alert and sound in 1982 when he executed the Will as deceased had chaired all the Board Meetings of the family company (bundle B pp. 206-226): Attendance and minutes of meeting from 3 October 1981 – 30 April 1986). About a week after deceased's death, 3rd defendant read the said Will to all the siblings and none of them had raised any objection. He stated that plaintiff's entitlement under the Will of RM20,000 was disbursed to the plaintiff after probate was granted. On the letter dated 7 April 1982, written to him by the 3rd defendant's firm of solicitors enclosing the draft Will, DW1 explained that his late father must have instructed the firm of solicitors to write to him since his father had asked DW1 to draft the Will. After receiving the draft Will from 3rd defendant, he had discussed with the deceased and amended it according to deceased's wishes. He disagreed that the amendments were his own doing.

[7] DW2 is a family friend of DW1 and knew the deceased since 1971 or 1972 and had frequented the deceased's house in Lunas, Kedah or at Aboo Siti Lane, Penang and for dinner. He

described the deceased to be very firm and authoritative; deceased spoke with authority, and commanded respect including his children. No one dared to speak or argue with him or to influence him especially the children. DW2 added that throughout 1970s till 1985, the deceased was fit, reasonably healthy and alert.

[8] 2nd defendant who is residing in Singapore did not attend court. A medical report was tendered to certify that he was unfit to attend court for medical reasons. Learned counsel for the 2nd defendant informed this court that 2nd defendant would adopt the evidence of the 1st defendant. Learned counsel also attempted to tender a statement from the 2nd defendant sworn before a Notary Public in Singapore which was however rejected by this court upon objection taken by learned counsel for the plaintiff. This court is of the view that such a statement could not be tendered by the learned counsel for the 2nd defendant as this tantamount to counsel giving evidence from the Bar which is to be deprecated; see *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609 CA at p. 615. If the 2nd defendant was unable to attend trial, the proper person would be the Notary Public before whom the 2nd defendant affirmed his statement but he was not called. Furthermore, such admission of this statement would tend to prejudice the plaintiff as she would have no opportunity to cross-examine and challenge the contents of this statement. In the absence of the 2nd defendant's evidence going the other way, this court is aware of the implication that it ought to presume and accept the plaintiffs evidence as true against the 2nd defendant and secondly, this court ought to draw an adverse inference against the 2nd defendant; see *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 FC. However, a distinction must be drawn in this case where the 2nd defendant is certified by doctor to be unfit to attend court and not the case that he wilfully refused to attend court. Thus this court finds that *Takako Sakao* case is distinguishable as the respondent therein studiously refrained from giving evidence. I do not find it proper to draw an adverse inference in the circumstances against the 2nd defendant. In any event, the plaintiff is not relieved of her burden to prove her case whether the 2nd defendant testifies or not. If plaintiff is able to prove her case in accordance with her pleaded case and having satisfied the necessary burden of proof, perhaps the 2nd defendant who has led no evidence to rebut the plaintiff's case may have to face the risk of having judgment entered against him. Thus, this court will evaluate all the issues raised in this trial to determine ultimately whether the plaintiff has proved her case to

entitle her the judgment at the end of this trial. The 3rd defendant (DW3) confirmed that he prepared the Last Will and Testament of the deceased/testator. He took instructions from the testator himself and prepared the draft by typing it in his office. On 2 November 1982, the testator himself came to DW3's office and signed the Will after DW3 had explained to the testator who understood it. He averred that the draft was sent to DW1 *vide* his covering letter, bundle B p. 19 on the instruction of the testator although he (DW3) had vehemently objected to; the testator said 'send it'. He said the testator was very clear in what he wanted. The testator had caused some changes to the contents of the Will which was prepared for his approval. After execution of the Will, DW3 kept the original Will in the bank safe of his office and handed a sealed copy of the duplicate to the testator. After the testator's death on 31 December 1986, the Will was probated on 1 September 1987 and the Grant of Probate was issued on 4 October 1988. As to the five boxes of jewellery, DW3 said the deceased did not discuss with him nor did the 1st and 2nd defendants mentioned above them. DW3 was assertive that he did not receive instruction from the 1st defendant on the drafting of the Will but from the testator/deceased.

The 1st Issue

Whether The Deceased Had The Testamentary Capacity To Make And Execute The Will Dated 2 November 1982

[9] In the first place, there is no dispute that the Will was signed by the deceased himself on 2 November 1982. No issue or challenge was taken when DW3 testified as to the execution of the Will by the deceased in DW3's presence. There is also no challenge as to DW3 and another as an attesting witnesses to the signature of the deceased on the Will on 2 November 1982 when deceased went to DW3's office. The allegations by the plaintiff and her witness PW1 were that the deceased was ill with loss of memory etc. but there was no medical evidence to that effect and no such allegations of the plaintiffs case were put to DW3 in cross-examination. In *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639 CA and *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 CA, the Court of Appeal endorsed the principle laid down in *Browne v. Dunn* [1890] 6 R 67 as follows:

A It is essential that a party's case be expressly put to the opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then, he may be barred from raising it in as an argument.

B

[10] The plaintiff has apparently abandoned this allegation and may thus be barred from raising this in an argument. Be that as it may, evidence of PW1 shows that he was unaware of the actual condition of the deceased at the material time as he was not C around but had stayed overseas. When such allegations which were vehemently challenged by the defence are unsubstantiated, they remain as bare assertions and cannot be construed as facts; hence such evidence in all probabilities will not be given any value. Conversely, evidence of the 1st defendant *vide* the attendance of D the annual general meetings of Soon Eng Hooi & Sons Sdn Bhd, the deceased's company where the deceased signed his attendance and also signed the minutes as Chairman of the company for the period from 3 October 1981 to 30 April 1986 (bundle B pp. 206 - 226) showed unequivocally that the deceased had attended E those meetings and signed on those relevant documents during that relevant period for which the plaintiff was attempting to say that he was so unwell that he could not be able to make the Will. It has been contended by the learned counsel for the plaintiff that these documents were inadmissible because the company secretary F was not called. I must disagree for the simple reason that the 1st defendant who had attended the same meetings also affixed his signature on these documents besides the signature of the deceased and the other signatory, Soon Cheng Par. The 1st defendant had identified these documents. The deceased was and G the 1st defendant is literate in English. I find no reason why the 1st defendant who had attended the said meetings with his signature of attendance could not produce these documents of attendance and the minutes of meeting which he attended. The 1st defendant being the person who had personal knowledge of H those meetings and who authenticated by signing the attendance sheets of those meetings can certainly produce the said minutes pursuant to s. 73(1)(a) Evidence Act 1950 and the attendance sheets which he had authenticated with his signatures; see *PP v. Abdul Rahim Abdul Satar* [1990] 1 CLJ 840; [1990] 3 CLJ (Rep) I 1 which held *inter alia* that:

> The mere deed of composing, framing, ascribing, or preparing a document or reducing certain details into writing, does not *ipso facto* turn the writer into the maker of a document, within the contemplation of the hearsay rule. In the Court's opinion, the affirming person, for whose purpose or on whose behalf the averments contained in the documents are made, is the actual maker of the document. The maker is the person who authenticates the documents ...

[11] There is, in addition, no dispute as to the signature of the deceased on these attendance documents and on the minutes. What the defence seeks to rebut in this case is that the deceased was fit and capable to attend the annual general meeting every year from 1981 to 1986 and the fact that he had signed on each and every minutes of those said years indicates that he was not mentally unfit to make his Will on 2 November 1982 when he could attend the meetings and signed to confirm those minutes of annual general meetings. I must say that the minutes of meetings were not tendered to prove what were contained therein and the truth of the contents but merely to show that the deceased was still alert and fit to be able to affix his signature on those minutes of meeting as the Chairman of the company. With that, I hold that the documents bundle B pp. 206-226 are admissible.

[12] The test to apply whether the deceased had the testamentary capacity to make and execute his Will is whether he had been subnormal from birth or has suffered impairment of the mind during his lifetime whether through injury, physical or mental illness, senility or addiction (*Longford v. Purdon* [1877] 1 LR Ir. 75 at 77) and this testamentary capacity must be at the time when the deceased executed the Will (*Banks v. Goodfellows* [1870] 5 QB 549; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, 321 FC). In *Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 4 CLJ 90 CA, His Lordship Gopal Sri Ram JCA (as he then was) said at p. 93:

> Now the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator. What the law requires to vitiate testamentary capacity is an insane delusion existing at the time of making of the will. This will include insanity at the time of the making or giving instructions for the making of the will ...

A In *Judah v. Isolyne Bose* [1945] AIR PC 174 Lord Goddard when delivering the advice of the Privy Council held that the mere fact that the testatrix was unwell when she executed her will is a long way from saying that she had no testamentary capacity.

B **[13]** The unchallenged evidence of DW3 who said that the deceased had executed the Will after he had explained its contents and after the deceased had understood them indicates an affirmative proof or fact that at the time of the execution of the Will on 2 November 1982, the deceased understood the effect of his wishes being carried out upon his death, the extent of the C property of which he is disposing and the nature of the claims on him in that he would be able to comprehend the relationship of the persons who may be fitting objects of his bounty to himself so that he could decide whether or not to give each of them any part of his property by his Will; see *Theobald on Wills,* 16th edn. D by John G. Ross Martyn, Stuart Bridge and Mika Oldham p. 30 para 3-02, 3-18. Even if the deceased might be unwell, there was no evidence of any impairment of his mental faculty nor any evidence of insane delusion to vitiate his making of the Will. Therefore, I hold that the deceased had the testamentary capacity E when he executed the Will in the presence of DW3 and another witness on 2 November 1982 and the plaintiff had failed to prove otherwise.

[14] From the submission by the learned counsel for the plaintiff, F there is a candid admission of a lack of medical evidence to prove any impairment of the deceased's mind on the testamentary capacity of the deceased as in the plaintiff's pleaded case but it derails onto the allegation of negligence on the 3rd defendant for not being able to produce a retainer agreement, any G correspondence with the deceased, any instruction sheet as regards the Will and any bill for his work, I tend to agree with the learned counsel for the 3rd defendant that the plaintiff ought to have served a notice on the 3rd defendant to produce these documents under s. 163 of the Evidence Act 1950, failing which H it is untenable to contend that defendant was unable to produce because he did not have them, bearing in mind that the incident of the making and execution of the Will was in 1982 which is about 29 years ago. To this court, all these omissions to produce those documents even if they were not produced, do not affect I the fact that the deceased was having testamentary capacity to execute the Will. I am positive upon a finding of facts that the plaintiff had failed to prove that the deceased lacked the testamentary capacity to make and execute his Will dated

2 November 1982. It is not the concern of this court as to the fairness of the Will and "A court must resist the natural temptation to set aside a will on the ground that it does not appear to be fair, equitable or just" once it is so satisfied that a testator understood the dispositions of a Will and that it was duly executed by him as his Will: per His Lordship Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin @ Lee Teck Seng & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 CA as cited by the learned counsel for the 1st defendant.

The 2nd Issue

Whether There Were Any Suspicious Circumstances To The Making Of The Will And/Or Any Conspiracy To Defraud The Deceased And/Or The Plaintiff By The Defendants

[15] The only suspicious circumstance raised by plaintiff is as to why instructions from April 1982 could not have been directly sought from the deceased. To submit so is to totally ignore the direct and unchallenged evidence of DW3, the solicitor who prepared the Will. His evidence is that he took instruction from the deceased himself who was even able to climb the flight of stairs up to his office. The draft was however sent to DW1 upon the insistence by the deceased although DW3 had strongly objected. Evidence of DW1 is that he was instructed to draft the Will. His evidence nevertheless shows that he received the draft from DW3 and discussed with the deceased who gave him instructions to amend and he amended accordingly as can be seen in his writing at p. 20 bundle B of the draft Will. In the light of DW3's clear evidence, I do not think that DW1 had himself drafted the Will. The important consideration is whether with those amendments handwritten by DW1 on the draft Will, did the deceased understand and approve them? In *Theobald on Wills (supra)* at p. 33 para 3-11, the learned author said:

> A testator must know and approve the contents of his will. This is because a will must be the result of a testator's own intelligence and volition, though its contents need not originate from the testator provided he understands and approves them ...

[16] DW3 stated emphatically that before the deceased executed the Will, he had explained its contents and deceased understood them and he signed it. This is the unchallenged evidence and must be accepted as true. I am therefore satisfied from a finding of facts that there was no suspicious circumstance surrounding the making of the Will as submitted by the plaintiff and hold that the

alleged amendments by DW1 on the draft Will had received the approval by the deceased as he had understood the contents of the final Will which incorporated the said amendments and signed his signature accordingly. His signature is his assent in the absence of fraud or any vitiating factors.

[17] On the question of fraud, it is incumbent upon the plaintiff to prove on a standard of proof of beyond reasonable doubt. In *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 FC. His Lordship Steve Shim CJ (Sabah & Sarawak) held *inter alia* as follows:

> [1] ...
>
> [2] With regard to a standard of proof to be applied in civil proceedings, a clear distinction must be drawn as between 'forgery' and 'fraud'. The general rule is that proof in civil proceeding of facts amounting to the commission of a crime (including forgery) need only be on a balance of probabilities. However, the common law in Malaysia had developed an exception to this general rule; hence, where fraud (as opposed to forgery) is alleged in civil proceedings, it (the alleged fraud) has to be proved beyond a reasonable doubt.

[18] From all the evidence before this court, I must say that there is not an *iota* of evidence to prove the allegation of conspiracy to defraud the deceased and/or the plaintiff, in particular, by the defendants. I am inclined to agree with the submission by the learned counsel for the 2nd defendant that the plea of fraud and conspiracy had been abandoned at the trial and that such plea should not be countenanced. In any event, I am of the view that deceased knew and understood what he was doing when he executed the Will on 2 November 1982 and he only died on 31 December 1986 ie, four years after execution of his Will. Such a lapse of four years after execution of his Last Will and Testament till his death would have dispel any allegation of fraud or conspiracy to defraud the deceased in relation to the said Will as the deceased could have easily made a new or fresh Will at anytime thereafter should he doubt his Will dated 2 November 1982. The reasonable conclusion to draw when the deceased did not make any new or fresh Will to supersede the Will is that the deceased had intended the Will dated 2 November 1982 to be his Last Will and Testament. Plaintiff herself did not lead any evidence to show how she was allegedly defrauded by the defendants. She had accepted the bequeath of RM20,000 from the deceased's Will after the Grant of Probate. She had never challenged the petition

for Grant of Probate filed by the defendants which she should have and could also have done so when her brother Ng Cheng Par filed his suit. The reason for not having done so is only best known to the plaintiff. Consequently, I hold that the plaintiff had failed to prove such allegation of conspiracy to defraud the deceased and/or herself.

3rd Issue

Whether The Defendants Had Fraudulently Concealed And/Or Neglected To Disclose The Entirely Of The Properties Comprised In The Estate Of The Deceased In The Petition For The Grant Of Probate

[19] The twist of the plaintiff's claim is premised on the alleged five bags of jewellery purportedly to be belonging to her late mother as stated in the list of the jewellery at bundle B p. 26. I am inclined to agree with the learned counsel for the 1st defendant when he submitted that if the jewellery belonged to plaintiff's late mother, they do not form part of the deceased's estate. The said Will dated 2 November 1982 (bundle B pp. 16-18) did not mention anything about any jewellery and no disposition was made regarding any jewellery. Assuming that these five bags of jewellery existed as alleged by the plaintiff and assuming that they belonged to the deceased upon his wife's death for which no bequeath had been made, these jewellery could only fall into the residue of the deceased's estate. Under cl. 5 in the Will, it states:

> 5.1 direct my Trustees To Hold the rest and residue of my estate not hereby devised or bequeath for my sons as followed:
>
> (a) To my son the said Soon Cheng Sai two (2) shares.
>
> (b) To my son Soon Cheng Par one (1) share and
>
> (c) To my son the said Soon Cheng Kee one (1) share.

[20] It is apparent that the plaintiff is not entitled to any of the residuary estate of the deceased pursuant to cl. 5 of the said Will but the three brothers named. On this ground, her claim must fail. Evidence – wise, plaintiff is uncertain of the items of jewellery as listed at p. 26 bundle B; she said she had seen some and she did not know who prepared this list of missing assets, pp. 26-28 bundle B inclusive the list of jewellery. With this uncertainty, I must hold that the plaintiff had failed to prove the jewellery as listed out as the missing assets at p. 26 bundle B. I am also not satisfied from all evidence before me that the plaintiff had proved

the other items as listed at pp. 27-28 bundle B. To reiterate, even if these items did exist, plaintiff is still not entitled to claim them as she is not one of the beneficiaries to the residuary estate pursuant to cl. 5 of the Will reproduced above.

4th Issue

Whether The Plaintiff's Claim Is Statute Barred

[21] The 1st defendant submitted that the plaintiff's claim is barred by the Limitation Act as the Will was opened and read by DW3 to all the children together with the plaintiff's husband about one week after the death of the deceased. The plaintiff had also signed an acknowledgement for the RM20,000 devised to her under the Will on 13 January 1989. Plaintiff in evidence stated she knew about the Will when it was probated. It is undisputed that the Will was probated on 1 September 1987 and the Grant of Probate was issued by the High Court at Penang on 4 October 1988. Going by the plaintiff's evidence that she came to know about the Will when it was probated which taking the later date of issuance of the Grant of Probate on 4 October 1988 into account, plaintiff has taken about 16 years to file this suit when she filed it on 28 January 2004. Even if the date when she accepted the RM20,000 being her benefit under the Will and signed, her acknowledgement receipt on 13 January 1989 (bundle B p. 227), is to be construed as the date she became aware of the said Will of the deceased, it was still a lapse of 15 years before this action was filed. Section 23 of the Limitation Act 1953 (Act 254) provides:

> 23. Subject to subsection 22(1) of this Act, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due.

[22] Section 22(1) of the Act refers to limitation of actions in respect of trust property where there is any fraud or fraudulent breach of trust to which the trustee was a party or privy or for the purpose of recovery of trust property or proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use. This is not applicable in the instant case

as this court has found no fraud in this case. Section 23 of the Act clearly bars any action after the expiration of 12 years from the date when the right to receive the share or interest accrued. I am of the view that taking whichever date as illustrated in the preceding paragraph for the purpose of computation, when the plaintiff filed her action on 28 January 2004, it had exceeded the 12 years limitation and consequently, s. 23 of the Act applies to bar the plaintiff from her claim to the personal estate of her late father, the deceased. On this ground alone, plaintiffs claim ought to be dismissed.

Conclusion

[23] Having evaluated all evidence before this court and having considered all submissions by the respective parties, I hold that plaintiff has failed to prove her claim against all three defendants herein or that the plaintiff's claim fails pursuant to s. 23 of the Limitation Act 1953. Plaintiff's action is therefore dismissed.

[24] On the questions of costs, learned counsel for the 1st and 3rd defendants submitted that the costs should be jointly and/or severally paid by PW1, plaintiff's nephew and attorney as he was instrumental in instituting this action for the plaintiff notwithstanding the consent judgment entered into in the earlier suit filed by his father Soon Cheng Par against the 1st and 2nd defendants in which PW1 was actively involved for his father. It was submitted that this court may order costs to be paid by PW1 notwithstanding that strictly he is not a party but because of his 'closeness' to the plaintiff and being privy to the earlier suit citing the case of *Takako Sakao v. Ng Pek Yuan & Anor (No. 3)* [2010] 1 CLJ 429 FC. His Lordship Gopal Sri Ram FCJ in delivering the judgment of the Federal Court said at p. 440:

> Dealing with the first question, it is now settled that a court has power to direct a non-party – and ... – to pay the costs of any suit, appeal or other proceeding. This was established by the decision of the House of Lords in *Aiden Shipping Ltd. v. Interbulk Ltd.* [1986] AC 965. In *Symphony Group Plc. v. Hodgsen* [1994] QB 179, the English Court of Appeal in the judgment of Balcombe LJ laid down the following guidelines for the making of a costs order against a non-party:
>
> (1) An order for the payment of costs by a non-party will always be exceptional: see per Lord Goff in *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] AC 965. The judge should treat any application for such an order with considerable caution.

A (2) ...

(3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. At the very least this will give the non-party an opportunity to apply to be joined as a party to the action under Order 15 r. 6(2)(b)(i) or (ii).

Principles (2) and (3) require no further justification on my part; they are an obvious application of the basic principles of natural justice.

(4) An application for payment of costs by a non-party should normally be determined by the trial judge: see *Bahai v. Rashidian* [1985] 1 WLR 1337.

D (5) ...

(6) ...

(7) Again, the normal rule is that the witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings. One reason for this immunity is so that witnesses may give their evidence fearlessly: see *Palmer v. Durnford* [1992] QB 488, 487. In so far as the evidence of a witness in proceedings may lead to an application for the costs of those proceedings against him or his company, it introduces yet another exception to a valuable general principle.

(8) ...

(9) ...

G Note: Only the relevant guidelines to the present case are quoted above.

[25] From the guidelines enunciated above, one pertinent consideration that the court must consider is the basic principles of natural justice in that the non-party should be warned at the earliest opportunity of the possibility that costs may be sought or applied against him for perhaps his acute involvement or conduct in the case. Bereft of such an opportunity given to the non-party, it may be unjust to make such an order for costs against the non-party. His Lordship Gopal Sri Ram FCJ has so expressed at p. 442:

> In the present case, learned counsel for the second respondent complains that he and indeed Dato Chong are caught by surprise by the appellant's oral application. He says that if adequate notice had been given, he would have come prepared to meet the argument advanced against him. In our judgment there is merit in this submission. If you look at the third guideline in the Symphony case, you will see that the successful party must "warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him." That did not happen here. It is not justice, no matter what the indignation one may feel at the conduct of Dato Chong, to make an order for costs against him personally in the present circumstances. The appellant's application in that behalf was accordingly refused.

[26] Similarly, in the instant case, no warning of the possibility that costs may be applied against PW1, a witness and non-party, at the earliest opportunity in compliance with the 3rd guideline in *Symphony* case as in *Takako Sakao (No. 3)*. It is thus unjust to order costs against PW1. By the plaintiff's own evidence, she was emphatic that she brought this action on her own accord and that nobody could influence her. With that, it cannot be concluded, as submitted by the defendants, that PW1 was instrumental in instituting this action and to be solely blameable so as to be penalized with costs although he might have or had assisted the plaintiff. In the circumstances, I allow costs against the plaintiff in the sum of RM8,000 to each defendant but not against PW1. As a consequential order, the citation dated 20 January 2004 under Probate No. 32(45)-41-1987 is hereby discharged and the original Grant of Probate and Will deposited in the Registry of Penang High Court to be returned henceforth to the 1st defendant for and on behalf of the estate herein.